



RQ-544

THE TEXAS STATE UNIVERSITY SYSTEM

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May 24, 1993

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The Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78701-2548

Attention: Opinions Committee

MBJ RQ-544
~~FILE # ML 20408~~
FD# 20408

Dear Mr. Morales:

I respectfully ask your opinion on a question related to eligibility for resident tuition for competitive academic scholarship recipients at Southwest Texas State University.

The Board of Regents, Texas State University System, has accepted gifts of money from two donors. Both donors stipulated that their gifts must be used for scholarships to encourage academic excellence in the academic program in which the recipient is enrolled. Both donors required that students must apply and compete for the scholarships. The first donor specified that the recipient be selected from student-athletes at Southwest Texas State University. The second donor specified that the scholarship recipient be selected from students at SWT's music department who participate in an extracurricular music activity, such as the university marching band or symphony orchestra.

The Board of Regents accepted both gifts under §95.34 of the Education Code and asked Southwest Texas State University's recognized scholarship committee to select the recipients. To be eligible for consideration, students must apply for the scholarships. In the case of the first donor's funds, the scholarship committee will select scholarship recipients from competing applicants in the university's athletic program.

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For the second donor's funds, the committee will select recipients from competing applicants in the university's music program who participate in an extracurricular music activity.

Texas residents and nonresidents will compete for the scholarships. We anticipate that some of the students selected will be nonresidents. Under these circumstances, we ask your opinion on the following question: are nonresident student eligible for resident tuition rates if they receive scholarships meetings the requirements of § 54.064 of the Education Code and are required to participate in an extracurricular university activity?

We believe that nonresident students selected for scholarships under these circumstances will be eligible for resident tuition because these gifts meet the requirements of the statute and the criteria developed by the Texas Higher Education Coordinating Board. However, the Executive Vice President at Southwest Texas State University has received a letter from the Assistant Commissioner for Student Services at the Coordinating Board indicating that such students would not be eligible. I enclose a copy of the Assistant Commissioner's letter, dated May 20, 1992.

The Legislature provided only six criteria for a nonresident student to qualify to pay resident tuition under §54.064:

1. award of a competitive academic scholarship;
2. a competitive pool that includes both residents and nonresidents;
3. the scholarship must be for at least \$200;
4. the scholarship must be awarded by a committee officially recognized by the administration of the university;
5. the scholarships must be approved by the Coordinating Board; and
6. the number of nonresident students entitled to pay resident tuition based on the scholarship award may not exceed five percent of the number of students registered for the same semester the preceding academic year.

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Our scholarships meet all six requirements.

The Coordinating Boards' rules are found in 19 Tex. Admin. Code § 21.31. The rules add another criterion -- the purpose of the scholarship must be to encourage academic excellence in the academic program in which the student is enrolled. We believe that the Coordinating Board's rule was not validly adopted and exceeds the board's legislative authority. Sections 21.21 through 21.39 of 19 Tex. Admin. Code were published at 16 Texas Register 1338-1343. As required by the Administrative Procedure and Texas Register Act, Section 5(a)(3), Article 6252-13a, Vernon's Texas Civil Statutes, the Coordinating Board stated at 16 Texas Register 1338 that Sections 21.21-21.39 "are proposed under Texas Education Code § 61.027 and § 52.54, Texas Civil Statutes, which authorizes the Texas Higher Education Coordinating Board to adopt rules regarding determining residence status." These Sections were adopted at 16 Texas Register 3254 with the citation of Sections 61.027 and 52.54, Education Code, as authority for adoption. The authority of the Coordinating Board to adopt rules under § 52.54, Education Code, is limited to Chapter 52 of the Education Code. Similarly, the Coordinating Board's authority to adopt rules under § 61.027, Education Code, is to effectuate the provisions of Chapter 61 of the Education Code. Neither 19 TAC § 21.31 nor any of Sections 21.21 through 21.39 related to the subject matter of Chapter 52 or 61, Education Code; therefore, Sections 21.31 through 21.39 were not validly adopted.

Aside from the fact that the Education Code Sections cited as the basis for the adoption of 19 TAC Sections 21.21 through 21.39 do not authorize the adoption of rules on the subject addressed by those Sections, the provisions of 19 TAC § 21.31 do not support the conclusion reached in the letter from the Coordinating Board's Assistant Commissioner. After quoting 19 TAC § 21.31, the Assistant Commissioner concluded that:

. . . I cannot agree that a scholarship which requires a student to participate in any activity aside from academic endeavor has been awarded for the purpose of encouraging academic excellence in the academic program in which the student is enrolled. I can agree that the Medina County award can be for

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the purpose of encouraging academic excellence, as assumedly none of the recipients' time will be diverted from academic pursuit in order to fulfill scholarship requirements. However, in the case of students required to participate in debate, play in the band or participate in athletics, clearly the selection criteria excludes those who may have excellent academic records but whose personal qualities preclude participation in non-class activities. A student with a 4.0 g.p.a. who is wheelchair-bound obviously could hold the Medina County scholarship, assuming he/she is from that county. However, such a student is not likely to be able to play in the marching band or participate in athletics.

Certainly it is appropriate for scholarships that require participation in an activity outside the academic area to be awarded to students who excel academically; however, such awards should not also entitle the recipient, if a nonresident, to a waiver of the difference between the resident and nonresident tuition charge.

The conclusion of the Assistant Commissioner, i.e. that a scholarship requiring a student to participate in any activity other than academic endeavor is not awarded for the purpose of "encouraging academic excellence in the academic program in which the student is enrolled," is erroneous for two reasons. First, the extent, if any, that participation in an activity other than academic endeavor detracts from the ability of a student to achieve academic excellence depends upon what the activity is and the time that the student is required to devote to that activity. Participation in an extracurricular activity may actually promote the student's academic performance.

Second, the requirement that a competitive academic scholarship must "encourage academic excellence in the academic program in which the student is enrolled" is a criterion created by the Coordinating Board when it adopted 19 TAC § 21.31. Section 54.064, Education Code, does not contain this requirement and the Coordinating Board has no authority to enlarge upon the criteria

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provided by the Legislature. Kelly v. Industrial Accident Board, 358 S.W.2d 874 (Tex.Civ.App.-Austin 1962, error refused). Had the Legislature intended that competitive scholarships be awarded only to encourage academic excellence, it could easily have said so.

Neither the statute nor the Coordinating Board's rule addresses participation in an extracurricular activity. Whether to require a scholarship recipient's participation is a matter left to the discretion of the institution and its governing board, in determining whether to accept and administer gifts "for the purposes and under the limitations and provisions declared in writing." Tex. Education Code § 95.34.

Neither the statute nor the Coordinating Board rules prohibit the Board of Regents for limiting the competing students to a particular group, such as student-athletes or music students. The statute requires only that students compete with "other students" including Texas residents. The Coordinating Board's rule requires only that the purpose of the scholarship must be to "encourage academic excellence in the academic program in which the student is enrolled." Since both donors specified that their gifts must be used for scholarships that encourage academic excellence in the academic program in which the recipients are enrolled, we believe that they meet the Coordinating Board's requirements, even if those requirements were not validly adopted.

We believe that state interests are served by recognizing the Board of Regents' authority to determine and apply scholarship policy. Section 95.21(b) of the Education Code provides that "the board has authority to promulgate and enforce such rules, regulations, and orders for the operation, control, and management of the university system and its institutions as the board may deem either necessary or desirable."

Section 95.34 of the Education Code authorizes the board to accept gifts and to administer them "for the purposes and under the limitations and provisions declared in writing" in the gift. Citing Foley v. Benedict, 55 S.W.2d 805 (Tex. 1932), your office held that a state university's board of regents has considerable latitude in exercising powers delegated to it by the legislature, subject to review for abuse of discretion. Op. Tex. Att'y Gen. No. MW-373 (1981).

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We appreciate your consideration of our request. If you require additional information, please call our staff at (512) 463-1808.

Sincerely,

A handwritten signature in cursive script, reading "Daniel S. Ouellette". The signature is fluid and elegant, with the first name "Daniel" and last name "Ouellette" clearly distinguishable.

Daniel S. Ouellette
Chairman

DSO/tm
enclosure